

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,) MB Docket No. 05-98
FM Broadcast Stations.) RM-11187
(Wheatland, Rock River, Lusk, Gillette,) RM-11252
Moorcroft, Pine Haven, Upton, Wyoming, and) RM-11253
Edgemont, Custer, Murdo, Wall and Ellsworth)
AFB, South Dakota)¹

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 4, 2006

Released: January 6, 2006

By the Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a *Notice of Proposed Rule Making* issued at the request of Mitchell Beranek ("Petitioner"), proposing the allotment of Channel 298A at Wheatland, Wyoming, as its fourth FM commercial broadcast service.² Petitioner filed comments and reply comments. Keyhole Broadcasting, LLC, licensee of Station KXXL(FM), Gillette, Wyoming and Mount Rushmore Broadcasting, Inc., licensee of Station KAWK(FM), Custer, South Dakota (collectively "Joint Parties") filed jointly a counterproposal and reply comments. Kona Coast Radio, LLC, ("Kona Coast"), permittee of Station KVAN(FM), Rock River, Wyoming, filed a counterproposal and reply comments. Clear Channel Broadcasting Licenses, Inc. ("Clear Channel") filed reply comments.

2. **Background.** The *Notice* proposed the allotment of Channel 298A at Wheatland, Wyoming, as its fourth FM commercial broadcast service. Petitioner filed comments, reiterating its continued interest in the allocation of a new Class A channel allotment at Wheatland. Petitioner states that she would file the necessary application or participate in an auction to implement the proposed Wheatland allotment, if granted.

3. The Joint Parties filed a counterproposal requesting the allotment of Channel 289C1 at Edgemont, South Dakota, as its first local service. To accommodate the proposed Edgemont allotment, the Joint Parties requests the reallocation of Channel 285C from Custer to Ellsworth AFB, South Dakota, as its first local service and modification of the Station KAWK(FM) license accordingly. To accommodate these proposals, the Joint Parties propose a series of channel substitutions at Upton, Wyoming, Moorcroft, Wyoming, Gillette, Wyoming, Wheatland, Wyoming, and Pine Haven, Wyoming; and Wall, South Dakota and Murdo, South Dakota.

4. Kona Coast filed a counterproposal requesting the substitution of Channel 242C1 for Channel 240A at Rock River, Wyoming and modification of the Station KVAN(FM) license accordingly. To

¹ Rock River, Lusk, Gillette, Moorcroft, Pine Haven, Upton, Wyoming, and Edgemont, Custer, Murdo, Wall and Ellsworth AFB, South Dakota have been added to the caption. See *Public Notice*, Report No. 2717, released June 24, 2005.

² *Wheatland, Wyoming*, 20 FCC Rcd 5252 (MB 2005).

accommodate this upgrade, Kona Coast proposes the substitution of Channel 247A for vacant Channel 298A at Wheatland, Wyoming; and substitution of Channel 299C for vacant Channel 242C at Lusk, Wyoming.

5. In response to the *Public Notice*, the Joint Parties filed reply comments proposing a "Universal Solution" that would eliminate the existing conflicts between the three proposals. Specifically, the Joint Parties proposes the substitution of Channel 299C for vacant Channel 288C at Wall, South Dakota, and the substitution of Channel 298A for vacant Channel 289A at Wheatland, Wyoming, to resolve the conflict with the Kona Coast counterproposal. Moreover, the Joint Parties requests the allotment of Channel 247A in lieu of Channel 298A at Wheatland to eliminate the mutually exclusivity with the *Notice's* proposal.

6. **Discussion.** The Kona Coast counterproposal is technically defective pursuant to Section 73.315 of the Commission's rules with respect to the proposed Channel 299C substitution at Lusk. Specifically, there is a major obstruction in the direction toward the community, which prevents the proposed 70 dBu contour from providing one hundred percent 70 dBu coverage to Lusk. Additionally, the proposed Lusk channel substitution violates Section 73.208(a)(1) of the Commission's rules because Channel 299C is short-spaced to the licensed site of Station KRVK, Channel 300C, Midwest, Wyoming.³ We recognize that Station KRVK has a pending application to specify operation as a Class C1 facility at Midwest to which the proposed Channel 299C at Lusk protects.⁴ However, the proposed Lusk channel substitution must protect the licensed site of Station KRVK as a Class C facility until the outstanding Class C1 construction permit is granted, and licensed at Midwest.⁵ As a result, the Kona Coast counterproposal is contingent on the licensing of Station KRVK as a Class C1 facility. Counterproposals must be capable of being effectuated at the time they are granted and cannot be contingent upon future actions by third parties.⁶ Accordingly, the Kona Coast counterproposal is dismissed.

7. The Joint Parties counterproposal conflicts with the *Notice's* proposal to allot Channel 298A at Wheatland, Wyoming, as its fourth FM commercial broadcast service. A review of the proposals indicates that both proposals serve the public interest. Generally, conflicting proposals are compared under our policy set forth in *Revision of FM Assignment Policies and Procedures* in instances where no alternative channels are available to eliminate the conflict.⁷ In this instance, no comparison is needed because we are adopting the Joint Parties' Universal Solution by allotting alternate Channel 247A at Wheatland, as its fourth FM commercial broadcast service, which requires a site restriction of 2.3 kilometers (1.4 miles) north at reference coordinates 42-04-28 NL and 104-56-51 WL.

8. Accordingly, we are allotting Channel 289C1 at Edgemont, South Dakota, as its first local service.⁸ To accommodate this allotment, we are substituting Channel 283C1 for vacant Channel 290C1

³ See File No. BLH-20011018AFC.

⁴ See File No. BPH-20030602ACU.

⁵ *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment*, 4 FCC Rcd 2413(1989), see also 47 C.F.R. § 73.208(a)(1).

⁶ See *Cloverdale, Montgomery and Warrior, Alabama*, 12 FCC Rcd 2090 (MMB 1997), see also *Cut and Shoot, Texas*, 11 FCC Rcd 16383 (MMB 1996).

⁷ 90 FCC 2d 88, 91 (1988). The FM Allotment priorities are (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3)].

⁸ Edgemont is an incorporated community located in Fall Fiver County with a 2000 U.S. Census with a population of 867 persons. Edgemont has its own mayor, Mark Hollenback. The community has its own zip code (57735), chamber of commerce, public library, medical clinic, elementary school and school district, theatre company (the Edgemont Theatre Company, golf and racquet club, two churches (Edgemont Baptist Church and Assembly of (continued....)

and Channel 228A for vacant Channel 283A at Upton, Wyoming. Moreover, we are substituting Channel 291A for Channel 228A at Moorcroft, Wyoming and modifying the authorization for this allotment, File No. BPH-20050103AGC accordingly. In addition, we are substituting Channel 260C2 for Channel 280C2 at Gillette, Wyoming and modifying the FM Station KXXL license accordingly;⁹ substituting Channel 256A for vacant Channel 260A at Pine Haven, Wyoming; substituting Channel 299C for vacant Channel 288C at Wall, South Dakota and substituting Channel 298A for vacant Channel 289A at Wheatland, Wyoming. Additionally, to accommodate the Edgemont allotment, we are substituting Channel 285C for Channel 286C1 at Custer, South Dakota, reallocating Channel 285C from Custer to Ellsworth AFB, South Dakota, as its first local service and modifying the Station KAWK(FM) license accordingly. To facilitate the Ellsworth AFB reallocation, we are substituting Channel 283A for Channel 285A at Murdo, South Dakota; and modifying the authorization for this allotment, File No. BSFH-20040806AID to reflect this change.¹⁰ The affected permittees and licensees have consented to the channel substitutions for their respective stations. The Joint Parties states that they will reimburse the affected permittees and licensees consistent with the *Circleville* policy.¹¹

9. A staff engineering analysis determines that Channel 289C1 can be allotted to Edgemont in compliance with the Commission's rules provided there is a site restriction of 33.3 kilometers (20.7 miles) northwest of Edgemont at coordinates 43-32-32 NL and 104-04-12 WL. Moreover, Channel 283C1 and Channel 228A can both be allotted to Upton in compliance with the Commission's rules provided there is a site restriction of 8.5 kilometers (5.3 miles) northwest of Upton at coordinates 44-08-58 NL and 104-42-28 WL. Channel 291A can be allotted to Moorcroft at the New Station current authorized site in compliance with the Commission's rules at coordinates 44-16-15 NL and 104-56-00 WL, which requires a site restriction of 1.6 kilometers (1.0 miles) northeast of Moorcroft. Channel 260C2 can be allotted to Gillette at the current licensed site of FM Station KXXL in compliance with the Commission's rules at coordinates 44-13-50 NL and 105-27-45 WL, which requires a site restriction of 7.4 kilometers (4.6 miles) southeast of Gillette. Channel 256A can be allotted to Pine Haven in compliance with the Commission's rules at city reference coordinates 44-21-28 NL and 104-48-36 WL. Channel 299C can be allotted to Wall in compliance with the Commission's rules provided there is a site restriction of 1.9 kilometers (1.2 miles) east of Wall at coordinates 43-59-47 NL and 102-13-07 WL. Channel 298A can be allotted to Wheatland in compliance with the Commission's rules at city reference coordinates 42-03-16 NL and 104-57-08 WL. Additionally, Channel 285C can be allotted to Ellsworth AFB at the current licensed site of Station KAWK(FM) in compliance with the Commission's rules at coordinates 43-44-41 NL and 103-28-52 WL, which requires a site restriction of 55 kilometers (34.2 miles) southwest of Ellsworth AFB. Lastly, Channel 283A can be allotted to Murdo at the New Station current authorized site in compliance with the Commission's rules at coordinates 43-53-24 NL and 100-43-06 WL, which requires a site restriction of 0.5 kilometers (0.3 miles) west of Murdo.

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God), municipal airport and a number of businesses, containing Edgemont in their title, such as, Edgemont Community Grocery, Edgemont City Shop, Ranchers Fee-Edgemont and Edgemont Memorial Clinic.

⁹ We note that the FM Table of Allotments reflects Channel 282A at Gillette, Wyoming. In this regard, in MM Docket No. 00-186, Channel 282A was substituted for vacant Channel 249A at Gillette. See *Rapid City, South Dakota and Gillette, Wyoming*, 16 FCC Rcd 825 (MMB 2001). During the pendency of this proceeding, Station KXXL was granted a construction permit for Channel 249A at Gillette contingent on the outcome of MM Docket No. 00-186. See File No. BPH-19970911M7. On October 6, 2004, Station KXXL was granted a license to specify operation on Channel 280C2 at Gillette, Wyoming. See File No. BLH-20031024AAL. Accordingly, we

¹⁰ College Creek Broadcasting, Inc. currently has a pending application requesting to upgrade to C0 facilities on Channel 283 at Murdo. See File No. BNPH-20041230ACQ. In the event that this application is granted, the applicant is required to specify operation on Channel 285C0 at Murdo.

¹¹ *Circleville, Ohio*, 8 FCC 2d 159 (1967).

10. We modify the Station KAWK(FM) license to specify Ellsworth AFB as the community of license pursuant to Section 1.420(i) of the Commission's rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest in the proposed allotment.¹² In this instance, the reallocation of Channel 285C at Ellsworth AFB, South Dakota is mutually exclusive with the licensed site of Station KAWK(FM), Channel 286C1, Custer, South Dakota.

11. When considering a reallocation proposal, a comparison is made between the existing allotment and the proposed allotment using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.¹³ In this instance, the reallocation will provide Ellsworth AFB with a first local service, priority (3). Custer will continue to receive local operational service from AM Station KFCR, priority (4). Moreover, the reallocation for Station KAWK(FM) results in a net gain of service to 26,870 persons. In this regard, the reallocation will provide a new service to eleven persons currently receiving one service; 117 persons currently receiving two services; 294 persons currently receiving three services; and 253 persons currently receiving four services, while the loss area contains an unpopulated area of 62 kilometers receiving two services; 178 persons receiving three services; and 1,419 persons receiving four services. In this instance, these loss area populations do not preclude favorable action on this proposal.¹⁴ Based on the foregoing, the Ellsworth AFB reallocation results in a preferential arrangement of allotments under priority (3) consideration.

12. The Ellsworth AFB reallocation requires no change in transmitter site for Station KAWK(FM). As such, the 70 dbu contour will continue to cover a hundred percent of the Rapid City, South Dakota Urbanized Area. Generally, we consider the extent the station will provide service to the entire Urbanized Area, the relative populations of the suburban and central city, and, most importantly, independence of the suburban community. In making this determination, we apply existing precedent.¹⁵ In this instance, a *Tuck* showing is unwarranted because Station KAWK(FM) currently covers hundred percent of the Rapid City, South Dakota Urbanized Area.¹⁶ However, the Joint Parties submitted a *Tuck* showing. As such, we concluded that this *Tuck* submission sufficiently demonstrates that Ellsworth AFB is independent of the Rapid City, South Dakota Urbanized Area. Thus, warranting consideration as a first local preference under the provisions of *Tuck*.

13. In this *Report and Order* we are substituting several vacant channels that appear in FM Auction No. 62, currently scheduled for January 12, 2006. Accordingly, the auction winner for each of these several modified allotments must file a construction permit application specifying the following channels: Channel 283C1 instead of vacant Channel 290C1 at Upton, Wyoming (Construction Permit FM166); Channel 228A instead of vacant Channel 283A at Upton Wyoming (Construction Permit FM165); Channel 256A instead of vacant Channel 260A at Pine Haven, Wyoming (Construction Permit FM161); and Channel 298A instead of vacant Channel 289A at Wheatland, Wyoming (Construction Permit FM169).

¹² See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989) ("Change of Community R&O"), recon. granted in part, 5 FCC Rcd 7394 (1990).

¹³ *Id.* note 14.

¹⁴ See *Earle, Pocohantas and Wilson, Arkansas, Como and New Albany, Mississippi*, 10 FCC Rcd 8270 (MMB 1995); *Huntsville and Willis, Texas*, 10 FCC Rcd 3329 (MMB 1995); see also *Seabrook, Huntsville, Bryan, Victoria, Kennedy, and George West, Texas*, 10 FCC Rcd 9360 (MMB 1995).

¹⁵ See *Huntington Broadcasting Co. v. FCC*, 192 F. 2d 33 (D.C. Cir. 1951); *RKO General*, 5 FCC Rcd 3222 (1990); *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1998) ("*Tuck*").

¹⁶ See *Jackson and Madison, Mississippi*, 20 FCC Rcd 12147 (MB 2005); see also *East Lost Angeles, Long Beach and Frazier Park, California*, 10 FCC Rcd 2864 (MMB 1995).

14. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

15. Accordingly, pursuant to the authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS ORDERED, That effective February 21, 2006, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED, with respect to the communities listed below, to read as follows:

<u>Communities</u>	<u>Channel No.</u>
Custer, South Dakota	-----
Edgemont, South Dakota	289C1
Ellsworth AFB, South Dakota	285C
Gillette, Wyoming	245C1, 260C2, 264C1
Moorcroft, Wyoming	291A
Murdo, South Dakota	283A
Pine Haven, Wyoming	256A
Upton, Wyoming	228A, 283C1
Wall, South Dakota	299C
Wheatland, Wyoming	247A, 269A, 293C1, 298A

19. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a) that the authorization of College Creek Broadcasting, Inc. for New Station, Channel 285A, Murdo, South Dakota, IS MODIFIED to specify operation on Channel 283A at Murdo, South Dakota, subject to the following conditions:

(a) Within 90 days of the effective date of the *Order*, the permittee of New Station shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

20. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a) that the authorization of Family Voice Communications, LLC for New Station, Channel 228A, Moorcroft, Wyoming, IS MODIFIED to specify operation on Channel 291A at Moorcroft, Wyoming, subject to the following conditions:

- (a) Within 90 days of the effective date of the *Order*, the permittee of New Station shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

21. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a) that the license of Keyhole Broadcasting, LLC for FM Station KXXL, Channel 280C2, Gillette, Wyoming, IS MODIFIED to specify operation on Channel 260C2 at Gillette, Wyoming subject to the following conditions:

- (a) Within 90 days of the effective date of the *Order*, the licensee of FM Station KXXL shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

22. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a) that the license of Mt. Rushmore Broadcasting, Inc. for Station KAWK(FM), Channel 286C1, Custer, South Dakota, IS MODIFIED to specify operation on Channel 285C at Ellsworth AFB subject to the following conditions:

- (a) Within 90 days of the effective date of the *Order*, the licensee of Station KAWK(FM) shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307,

unless the proposed facilities are categorically excluded from environmental processing.

23. Pursuant to 47 C.F.R. Sections 1.1104(1)(k) and (3)(l) of the Commission's rules, Mt. Rushmore Broadcasting, Inc., licensee of Station KAWK(FM), Channel 286C1, Custer, South Dakota, is required to submit a rulemaking fee in addition to the fee required for the application to effectuate the community of license for Station KAWK(FM) to specify operation on Channel 285C at Ellsworth AFB, South Dakota at the time its Form 301 application is submitted.

24. The window period for filing applications for Channel 247A at Wheatland, Wyoming and Channel 289C1 at Edgemont, South Dakota will not be opened at this time. Instead, the issue of opening these allotments for auction will be addressed by the Commission in a subsequent order.

25. IS FURTHER ORDERED, That the aforementioned proceeding IS TERMINATED.

26. For further information concerning this proceeding, contact Rolanda F. Smith, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau